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In The
Supreme Court of the United States
OCTOBER TERM, 1997

JOY TECHNOLOGIES, INC.
COAL FIELD OPERATIONS,
Petitioner,

v.

SECRETARY OF LABOR, MINE SAFETY
AND HEALTH ADMINISTRATION
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* BY THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI* 2

REASONS FOR GRANTING THE WRIT 3

THE TENTH CIRCUIT'S DECISION CONFLICTS SHARPLY WITH THOSE OF OTHER CIRCUITS ON IMPORTANT QUESTIONS OF FEDERAL LAW 3

1. The Definition of "Operator" 3

2. The Meaning of "Independent Contractor" 9

CONCLUSION 13

STATUTORY APPENDIX 1a

TABLE OF AUTHORITIES

CASES **Page(s)**

American Materials Corp., 4 FMSHRC 415, 1982 O.S.H.D. (CCH) ¶ 25,955 (FMSHRC 1982) 5

Asarco, Inc. v. FMSHRC, 868 F.2d 1195 (10th Cir. 1989) 8

Bituminous Coal Operators' Association v. Secretary of the Interior, 547 F.2d 240 (4th Cir. 1977) 7

Brennan v. Butler Lime & Cement Co., 520 F.2d 1011 (7th Cir. 1975) 12

Bulk Transportation Services, 13 FMSHRC 1354, 1991 O.S.H.D. (CCH) ¶ 29,461 (FMSHRC 1991) 4

Donovan v. Dewey, 452 U.S. 594 (1981) 9

Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C.Cir. 1984) 5

Energy Fuels Corp., 1 FMSHRC 299, 1979 O.S.H.D. ¶ 23,503 (CCH) (FMSHRC 1979) 8

Joy Technologies, Inc. v. Secretary of Labor, 99 F.3d 991 (10th Cir. 1996) 1, 4,7,10,11

Marshall v. Stoudt's Ferry Preparation Co.,
602 F.2d 589 (3d Cir. 1979),
cert. denied, 444 U.S. 1015 (1980) 5

Martin Marrietta Aggregates Central Div.,
2 FMSHRC 2163, 1980 O.S.H.D.(CCH)
¶ 24,819 (FMSHRC 1980) 5

National Industrial Sand Association v. Marshall,
601 F.2d 689 (3d Cir. 1979) 4, 6

Nationwide Mutual Insurance Co. v. Darden,
503 U.S. 318 (1992) 9-11

New England Telephone and Telegraph Co,
1980 O.S.H.D. (CCH) ¶ 24,523 (OSHRC 1980) 12-13

Old Dominion Power Co. v. Donovan,
772 F.2d 92 (4th Cir. 1985) 2, 3, 4, 6,12

Otis Elevator Co. v. Secretary of Labor,
921 F.2d 1285 (D.C. Cir. 1990) 4,7

U.S. Steel Mining Co., 10 FMSHRC 146,
1988 O.S.H.D. (CCH) ¶ 28,141 (FMSHRC 1988) 5

W.J. Bokus Industries, Inc., 16 FMSHRC 704,
1994 O.S.H.D. (CCH) ¶ 30,412 (FMSHRC 1994) 5

Westside Community Schools v. Mergens,
496 U.S. 226 (1990) 8

STATUTES

National Labor Relations Act,
29 U.S.C. § 157 10

Occupational Safety and Health Act of 1970,
29 U.S.C. §§ 651-678 9

Federal Mine Safety and Health Act of 1977,
30 U.S.C. §§ 801-962 2,4
Section 3(d), 30 U.S.C. § 802(d) 3, 1a
Section 3(h), 30 U.S.C. § 802(h) 5, 1a
Section 3(i), 30 U.S.C. § 802(i) 2a
Section 104(b)&(h), 30 U.S.C. § 814(b)&(h) 8
Section 104(d)&(e), 30 U.S.C. § 814(d)&(e) 8
Section 105(b)(1)(A) & (b)(2), 30 U.S.C.
§ 815(b)(1)(A) & (b)(2) 8
Section 107, 30 U.S.C. § 817 8

REGULATIONS

29 C.F.R. § 1910.269 *et seq.* 11
29 C.F.R. § 1910.269(l)(2) (Tables R-6 — R-10) .. 11
29 C.F.R. § 1910.269(m)(3)(ii) & (iii) 12
29 C.F.R. § 1910.269(q)(3)(xiii)-(xv) 11

29 C.F.R. § 1926.950 *et seq.* 11
29 C.F.R. §§ 1926.950(d) (Table V-1) 11
29 C.F.R. §§ 1926.950(d)(1)(ii)(b) 12
29 C.F.R. § 1926.952(c)(2) 11

30 C.F.R. § 48.22(a)(2) 5

30 C.F.R. § 77.501 12

30 C.F.R. § 77.807-2 11

LEGISLATIVE HISTORY

SUBCOMM. ON LABOR OF SENATE COMM. ON HUMAN RESOURCES, 95TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 (Comm. Print 1978) 5, 6, 7, 8

S. CONF. REP. NO. 95-461 (1977) 7

S. REP. NO. 95-181 (1977) 5, 6, 8

MISCELLANEOUS CITATIONS

Annotation, *What Is "Mine" Under Federal Mine Safety and Health Act of 1977*, 63 A.L.R. FED. 415 (1983) 5

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BRIEF *AMICUS CURIAE* BY THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The National Association of Manufacturers (NAM) and the Edison Electric Institute (EEI) support the petition for writ of certiorari by Joy Technologies, Inc. ("Joy"). The petition seeks review of the decision by the United States Court of Appeals for the Tenth Circuit in *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991 (10th Cir. 1996) (reproduced at Pet.App. 1a-16a).

The *amici* have filed with the Clerk the parties' letters of consent to file this brief.

INTEREST OF THE *AMICI*

Amicus National Association of Manufacturers ("NAM") is the Nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ about 85 percent of all manufacturing workers and produce over 80 percent of the Nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

Amicus Edison Electric Institute ("EEI") is the association of the United States investor-owned electric utilities and their industry associates worldwide. EEI's U.S. members serve 99 percent of all customers served by the shareholder-owned segment of the U.S. industry. They generate about 78 percent of all the electricity generated by electric utilities, and service 76 percent of all ultimate customers in the Nation. EEI appeared as *amicus curiae* in *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985), one of the decisions with which the Tenth Circuit disagreed. 772 F.2d at 93 n.1 (noting appearance).

Amici have a substantial interest in the issues raised by the petition. The Tenth Circuit's decision threatens to subject to regulation under the Federal Mine Safety and Health Act of 1977 ("Mine Act") innumerable companies that provide to mine operators services having only a tangential relationship to the extraction of minerals. Many members of NAM provide, as does Joy Technologies, services connected with the delivery of industrial equipment that would, if the Tenth Circuit's decision stands, make them mine "operators." EEI's members maintain electrical distribution lines on mine property; for ex-

ample, in *Old Dominion,* an electric utility allegedly became a mine "operator" when a lineman entered an electrical substation on mine property to fix the utility's own electric meter. See also the several additional examples given on page 4 below. *Amici*, whose members are subject to the Occupational Safety and Health Act and are vitally concerned about the safety and health of their employees, submit that Congress never intended to regulate under the Mine Act companies who provide services with only a tangential relationship to mining.

REASONS FOR GRANTING THE WRIT

THE TENTH CIRCUIT'S DECISION CONFLICTS SHARPLY WITH THOSE OF OTHER CIRCUITS ON IMPORTANT QUESTIONS OF FEDERAL LAW

1. The Definition of "Operator"

Section 3(d), 30 U.S.C. § 802(d), of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-962 ("Mine Act"), states that the term "operator" includes "any independent contractor performing services or construction at [a] mine."[1] There is a sharp split in the circuits over the test to determine whether a company performing a service on a mine property is a mine "operator" subject to the Mine Act. The Tenth and D.C. Circuits purport to rely on the literal wording of the phrase "performing services at [a] mine" to apply a broad

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[1] The definition states: "'operator' means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine[.]"

coverage test. Pet.App. at 16a, 99 F.3d at 999; *Otis Elevator Co. v. Secretary of Labor,* 921 F.2d 1285, 1290 (D.C. Cir. 1990). By contrast, the Fourth Circuit held that the legislative history of the provision "make[s] clear" Congress's intent to reach "only those independent contractors who are engaged in mine construction or the extraction process, and who have a 'continuing presence' at the mine." *Old Dominion*, 772 F.2d at 97 (quoting legislative history). The Third Circuit similarly held that outside companies are not "operators" unless their participation "in the running of the mine" is "similar" to the "substantial participation" required of owners and lessees. *National Indus. Sand Ass'n v. Marshall,* 601 F.2d 689 (3d Cir. 1979).

The resolution of this issue is of great importance to innumerable industrial, transportation, utility, and service companies. Many companies perform services on mine property that bear only the most tangential relationship to mineral extraction. These companies include manufacturers that deliver and service equipment such as cranes, bulldozers, and mining equipment; electrical utilities that maintain electrical substations and power lines; vending machine operators that deliver or re-stock vending machines; office machine suppliers that deliver or fix copiers or computers; telephone companies that install and maintain communications equipment; truckers that unload goods or haul minerals away; and geologists who inspect tailings ponds and impoundment dams.[2] Exacerbating the problem is that these services are often performed at facili-

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[2] *See*, in addition to this case, *Old Dominion*, and *Otis Elevator*, *Bulk Transportation Services,* 13 FMSHRC 1354, 1991 O.S.H.D. (CCH) ¶ 29,461 (FMSHRC 1991) (trucker hauling minerals away from mine is "operator").

ties that lie at the fringes of the broad statutory term "mine,"[3] such as office buildings, electrical substations operated by utility companies, unloading docks, and garages.[4]

Although the activities of such companies bear no resemblance to those Congress intended to regulate as mine "operators," the Tenth Circuit's decision threatens to subject them to the heavy regulatory burdens placed on mine "operators." As the Third and Fourth Circuits held, Congress did not intend to cover such companies. First, the phrase "independent con-

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[3] See the broad definition of "mine" in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h), reproduced in the appendix; *see also* S. REP. No. 95-181, at 14 (1977) ("mine" to "be given the broadest possible interpretation"; "doubts [should] be resolved in favor of inclusion of a facility"), *reprinted in* SUBCOMM. ON LABOR OF SENATE COMM. ON HUMAN RESOURCES, 95TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 589, 602 (Comm. Print 1978) ("Leg. Hist."); *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 592 (3d Cir. 1979) (statutory term "mine" is "much more encompassing than the usual meaning attributed to it"), *cert. denied*, 444 U.S. 1015 (1980).

[4] *See W.J. Bokus Industries, Inc.*, 16 FMSHRC 704, 1994 O.S.H.D. (CCH) ¶ 30,412 (FMSHRC 1994) (tools and equipment in maintenance garage covered); *U.S. Steel Mining Co.*, 10 FMSHRC 146, 1988 O.S.H.D. (CCH) ¶ 28,141 (FMSHRC 1988) (repair shop five miles from nearest mine); *Martin Marrietta Aggregates Central Div.*, 2 FMSHRC 2163, 1980 O.S.H.D. (CCH) ¶ 24,819 (FMSHRC 1980) (ALJ) (maintenance facility in downtown Topeka, Kansas); Annotation, *What Is "Mine" Under Federal Mine Safety and Health Act of 1977*, 63 A.L.R. FED. 415 (1983). *Cf.* 30 C.F.R. § 48.22(a)(2) (defining "miner" as including "any delivery, office, or scientific worker, or occasional, short-term maintenance or service worker"); *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958 (D.C. Cir. 1984) (clerk in mine office a "miner"); *American Materials Corp.*, 4 FMSHRC 415, 418, 1982 O.S.H.D. (CCH) ¶ 25,955 (FMSHRC 1982) (driver of customer's truck picking up mine products a "miner").

tractor performing services or construction at [a] mine" does not sit in isolation. It follows the phrase "owner, lessee, or other person who operates, controls, or supervises a coal or other mine" and hence must be construed in that light. As the Third and Fourth Circuits held, this language indicates that one designated as an operator must have "substantial participation in the running of the mine." *Old Dominion,* 772 F.2d at 97; *Nat'l Indus. Sand*, 601 F.2d at 701.

Second, the legislative history is unusually clear that Congress sought to bring two sorts of companies under the Mine Act: independent construction contractors who drive initial mine shafts and build mining facilities; and independent contractors who operate mines for owners. The legislative history explained that these companies have "a continuing presence" at the mine and are either "engaged in construction" or "engaged in the extraction process for the benefit of the owner or lessee of the property." Thus, S. REP. NO. 95-181, at 14 (1977), *reprinted in* SUBCOMM. ON LABOR OF SENATE COMM. ON HUMAN RESOURCES, 95TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 589, 602 (Comm. Print 1978) ("Leg. Hist."), states:

> [T]he definition of mine "operator" is expanded to include "any independent contractor performing services of construction at such mine." It is the Committee's intent to thereby include individuals or firms who are engaged in construction at such mine, or who may be, under contract or otherwise, engaged in the extraction process for the benefit of the owner or lessee of the property and to make clear that the employees of such individuals or firms are miners within the definition of the Federal Mine

> Safety and Health Act of 1977. . . . [T]his concept has been approved . . . in *Bituminous Coal Operators' Assn. v. Secretary of the Interior*, 547 F.2d 240 (4th Cir. 1977).

The Conference Committee report likewise states that the modification of the definition of "operator" "was intended to permit enforcement . . . against such contractors who may have a continuing presence at the mine." S. CONF. REP. No. 95-461, at 37 (1977), *reprinted in* Leg. Hist. at 1279, 1315.

The Tenth and D.C. Circuits purported to follow the literal wording of the definition of "operator" and refused to rely on the legislative history. Nonetheless, both courts recognized that the definition could not be applied literally and that it required an ameliorating construction. Thus, the Tenth Circuit stated that the services performed must be "significant" (Pet.App. 14a, 99 F.3d at 998), and it reserved decision on the question of the "Xerox service representative." Pet.App. at 16a, 99 F.3d at 1000. The D.C. Circuit similarly suggested two limiting constructions — that work at above-ground facilities might not be covered (921 F.2d at 1291 n.6),[5] and that "contact with a mine [might be] so infrequent or *de minimis* that it would be difficult to conclude that services were being performed." *Id.* at 1290 n.3. Neither court indicated what the source of these limiting constructions might be, and yet neither relied on the legislative history to determine their contours.

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[5] The D.C. Circuit distinguished *Old Dominion* on the ground that the utility worker "never so much as entered the mine." The D.C. Circuit appears to have overlooked that the electrical substation in *Old Dominion* was part of a "mine" because it was an above-ground installation on mine property. See notes 3 and 4 above.

That was error. If a statute cannot be literally read, it must be read in accordance with whatever light is shed by its legislative history. *E.g., Westside Community Schools v. Mergens,* 496 U.S. 226, 238-39 (1990). If statutory language requires construction — and all agree that the language here requires an ameliorating construction — adherence to congressional intent requires that the legislative history be considered.

Congress imposed the heavy regulatory burdens of the Mine Act to protect those engaged in mineral extraction, which Congress found to be among the most dangerous vocations in the Nation.[6] The Mine Act imposes some of the most drastic measures in any federal regulatory safety scheme and withholds procedural rights common under other administrative schemes. For example, an MSHA inspector has the power to order evacuation of a mine, and may do so even if no imminent danger is present.[7] A contest of an order or a citation does not stay its evacuation or abatement requirements during litigation.[8] Mine operators are strictly liable for violations[9]

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[6] *See* S. REP. No. 95-181 at 7, Leg. Hist. at 595 (miners eight times more likely to die than non-mining workers).

[7] *Compare* Sections 104(d) *and* (e) of the Mine Act, 30 U.S.C. § 814(d) and (e), *with* Section 107, 30 U.S.C. § 817.

[8] See Sections 104(b) & (h), 30 U.S.C. § 814(b) & (h), and 105(b)(1)(A) & (b)(2) (penultimate sentence), 30 U.S.C. § 815(b)(1)(A) & (b)(2); *Energy Fuels Corp.,* 1 FMSHRC 299, 306 n.9, 1979 O.S.H.D. (CCH) ¶ 23,503, p. 28,476 n.9 (FMSHRC 1979).

[9] *Asarco, Inc. v. FMSHRC,* 868 F.2d 1195, 1197-98 (10th Cir. 1989) (citing cases).

and may undergo warrantless searches.[10] And MSHA regulations are often very different and more burdensome than those of the Occupational Safety and Health Administration ("OSHA"), which regulates *amici's* members under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. See notes 13-14 and accompanying text. Whether these burdens should, in the face of substantial contrary evidence in the legislative history, be imposed on companies with only a tangential relationship to mining is an important issue that requires resolution by this Court.

2. The Meaning of "Independent Contractor"

This Court should also review the Tenth Circuit's refusal to apply the presumption in *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 323 (1992), to the term "independent contractor." *Darden* held that statutory terms are to be given their common law meaning in the absence of specific congressional guidance to the contrary. The questions raised by the Tenth Circuit's approach are important, for whether a company is an "independent contractor" arises in many settings under the Mine Act and affects the responsibilities of many companies.

Joy Technologies had argued that it was not an "independent contractor" because it lacked the kind of independent control over mine activities required by the common law. The Tenth Circuit declined to apply the common law meaning of the term. It reasoned that Congress's embedding of "independent contractor" in the phrase "independent contractor performing services or construction at [a] mine" rebutted the *Darden* presumption. The additional words, it stated, "expand [ ] the

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[10] *Donovan v. Dewey,* 452 U.S. 594 (1981).

meaning of 'independent contractor'" beyond the common law test. Pet.App. 11a, 99 F.3d at 997.

But common law terms used in statutes are nearly always embedded in other statutory language. If the Tenth Circuit's approach were sound, *Darden* would almost never apply. Moreover, the Tenth Circuit's reasoning is illogical; the addition of an adjectival phrase can only narrow the class of companies subject to the Mine Act, not broaden it.

This Court should also review the Tenth Circuit's approach to the branch of the *Darden* test that asks whether a common law definition would "thwart" the statutory purpose. The Tenth Circuit held that that purpose would be thwarted because Congress had "little reason" to distinguish, as the common law does, between employees and independent contractors. Pet. App. 12a, 99 F.3d at 998. That cannot be enough to rebut the *Darden* presumption. Congress nearly always uses common law terms for purposes different than the common law uses them. The common law, for example, did not use the word "employee" to determine who has the right to bargain collectively, but federal law does. National Labor Relations Act, 29 U.S.C. § 157. If the Tenth Circuit's approach were sound, *Darden* would apply only where Congress used common law terms in precisely the same way and for precisely the same purposes as the common law. If that were so, even *Darden* would have been differently decided.[11]

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[11] The Tenth Circuit stated in a footnote that, even if it were to apply the common law definition of independent contractor, it would find that Joy was an independent contractor because its service representative did not qualify as an employee of the mine owner. Pet.App. at 12a-13a n.2, 99 F.3d at 998 n.2. But that analysis ignores the crucial question whether Joy had independent control of the mining conditions. The point would no doubt be better and more fully explored on remand.

But *amici* urge this Court to review this aspect of the decision for a broader reason. *Darden* requires "specific" guidance from, or "clear" indications in the words or legislative history of a statute. The Tenth Circuit found neither. Instead, the Tenth Circuit employed the very analytical approach that *Darden* rejected — construing common law terms "in the light of the mischief to be corrected and the end to be attained." *Compare* 503 U.S. at 325 with Pet. App. 10a-12a, 99 F.3d at 997-98. The Tenth Circuit's treatment of *Darden* requires review by this Court.

Finally, *amici* bring to this Court's attention a concern of great practical importance. *Amici*'s members are regulated by OSHA under the Occupational Safety and Health Act. If the Tenth Circuit's decision stands, an employee performing the same work at different sites will sometimes fall under OSHA and sometimes under MSHA jurisdiction. This will increase regulatory burdens and confusion, and will adversely affect employee safety.

For example, employees of electric utilities who work on power lines are now trained to follow OSHA's industry-specific safety regulations.[12] Those employees will be confused and may well be endangered by the inconsistencies in safety requirements between MSHA and OSHA. For example, the two agencies have different requirements for safe working clearances from electrified lines (*e.g.*, ten feet versus two feet for common distribution voltages),[13] and shut-down of elec-

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[12] 29 C.F.R. § 1910.269 and § 1926.950 *et seq.*

[13] *Compare* the MSHA requirements at 30 C.F.R. § 77.807-2 *with* the OSHA requirements at 29 C.F.R. §§ 1926.950(d) (Table V-1), 1926.952(c)(2), 1910.269(l)(2) (Tables R-6 through R-10) *and* 1910.269(q)(3)(xiii)-(xv).

tric lines and equipment during servicing (locking versus tagging control switches).[14] Some of these regulatory differences, and their consequences for employees, were well stated by the Fourth Circuit in *Old Dominion*, 772 F.2d at 99.[15] Expecting employees to remember and follow different safety precautions as they cross MSHA and OSHA jurisdictional lines will diminish, not enhance, their safety and will add significantly to the Nation's regulatory burden.

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[14] *Compare* 30 C.F.R. § 77.501 (generally requiring locks) *with* 29 C.F.R. §§ 1926.950(d)(1)(ii)(b) *and* 1910.269(m)(3)(ii) & (iii) (generally permitting tags).

[15] The Fourth Circuit quoted the following analysis by the Occupational Safety and Health Review Commission in *New England Telephone & Telegraph Co.*, 1980 O.S.H.D. (CCH) ¶ 24,523 (OSHRC 1980):

> "Rules are more likely to be observed if their rationale is understood and it is made clear that they are not just arbitrary pronouncements but are grounded in practical reasons for safety." Employees who are told they must stay ten feet away from energized power lines if the power lines are in one geographic location but may come as close as two feet away from energized power lines if the lines are in another location, even though the latter lines are potentially just as lethal as the former, might well question the logic behind such instructions. Such questioning on the part of employees could lead to a failure to take such matters seriously and a failure to exhibit the caution necessary to prevent accidents. [Quoting *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1018 (7th Cir. 1975).]

CONCLUSION

The petition for writ of certiorari should be granted.

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STATUTORY APPENDIX

Section 3(d) of the Mine Act, 30 U.S.C. § 802(d), states:

> (d) "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine[.]

Section 3(h) of the Mine Act, 30 U.S.C. § 802(h), states:

> (h)(1) "coal or other mine" means
> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground,
> (B) private ways and roads appurtenant to such area, and
> (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

> (2) For purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities[.]

Section 3(i) of the Mine Act, 30 U.S.C. § 802(i), states:

> (i) "work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine[.]